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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA,
Plaintiff/Respondent

v.

PRYOR BOLTON and GLEN McCULLAH
d/b/a PRYOR AND GLEN COAL CO.,
Defendants/Appellants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

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February 24, 1986

QUESTIONS PRESENTED

1. Whether the Due Process rights of the Appellants were violated by an uncontestable, "final", and nonbankruptable assessment of nearly $200,000.00 being imposed on them by the Office of Surface Mining when they had never received timely and meaningful notices of the alleged Notices of Violations, Cessation Orders and the Notices of Proposed Assessments during the time periods when they were entitled to administrative remedies and when the Office of Surface Mining had actual knowledge of the lack of service and had the ability and means to insure notice.

2. Whether the regulations governing service of Notices of Violation, Cessation Orders, and Notices of Proposed Assessments violate Due

Process as matter of law or as applied under the circumstances of this case.

3. Whether equitable principles applied to the circumstances of the instant case preclude the Government from collecting a civil penalty of nearly $200,000.00 or whether the district court may award only a nominal penalty.

4. Whether the Equal Protection rights of the Appellants were violated by the application of the Surface Mining Control and Reclamation Act of 1977, 30 USC 1201. et seq., and implementing regulations, under the circumstances of this case.

PARTIES

Petitioners:	Pryor Bolton and Glen McCullah, d/b/a Pryor and Glen Coal Company
Respondent:	United States of America

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STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

JURISDICTION

The District Court for the Eastern District of Tennessee, Northern Division, entered an Order and Memorandum Opinion granting judgment in favor of the United States on August 31, 1984. Notice of Appeal was timely filed on September 20, 1984. The Court of Appeals had jurisdiction to review the final decision of the District Court pursuant to 28 USC Sec. 1291.

The Court of Appeals affirmed the District Court's ruling by a final Order filed on November 27, 1985. The right of appeal is not available in this action.

The Petitioner respectfully seeks further review of this case by

requesting the Court to grant this Petition for Writ of Certiorari, submitted pursuant to 28 U.S.C. Sec. 1254(1), timely filed under 28 U.S.C. Sec. 1201(c).

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition.

(All references to the record to the Joint Apendix filed by the parties with the Court of Appeals.)

The Petition of Pryor Bolton and Glenn McCullah (hereinafter Appellants or Bolton or McCullah) arises from a final judgment on August 31, 1984 by the United States District Court for the Eastern District of Tennessee, Northern Division. Judgment was entered in favor of the United States for One Hundred Ninety-Nine Thousand Eight Hundred

Dollars ($199,800.00) and interest at the rate at 11.9% per annum from the date of the judgment. The Petitioner filed a Notice of Appeal on September 20, 1984. The United States Court of Appeals for the Sixth Circuit affirmed on November 27, 1985.

The Complaint was brought by the United States on January 3, 1984 for the collection of civil penalties allegedly owed by Appellants pursuant to 30 USC Sec. 1268(b)(c)(d) of the Surface Mining Control and Reclamation Act of 1977, codified at 30 USC Sec. 1201 et seq. (J.A., p.3). The United States sought penalties in the amount of $199,800.00 on two (2) Notices of Violations (J.A., p.139,158) and three (3) Cessation Orders.

Appellants filed an answer on March

2, 1984. (J.A., p.25). Both parties conducted discovery by way of interrogatories, document requests and request for admissions (J.A., p.33,95,126). On March 27, 1984, the United States filed a Motion for Summary Judgment. (J.A., p.36)

The Appellants filed a reply to the Summary Judgment Motion filed by the United States and a Cross Motion for Summary Judgment with supporting Affidavits on April 27, 1984. (J.A., p.81) The United States replied to Appellants' Cross Motion on May 4, 1984.

Honorable Thomas G. Hull, Judge presiding, entered an Order and Memorandum on May 24, 1984 granting Summary Judgment in favor of the United States on the issues of law, setting for trial the issue of whether Appellants

had received notice of the Notice of Violations and Cessation Orders. (J.A., p.13)

The trial was set for August 28, 1984, at which time the parties appeared but no oral testimony was heard. The Trial Court rendered judgment against the Appellants on the record and allowed the parties to supplement the record by submission of further documentation. The final order and memorandum was entered on August 31, 1984. (J.A., p.8)

The Appellants timely filed a Notice of Appeal on September 20, 1984. (J.A., p.23) The parties filed a Joint Stipulation of Documents for Transmittal on Appeal. The Sixth Circuit Court of Appeals affirmed the Judgment on November 27, 1985.

Statement of the Facts

The facts relevant to this appeal are set forth in the pleadings, responses to discovery requests, exhibits and affidavits filed with the Court as more specifically set forth herein and the transcript of proceedings on August 28, 1984. (References to Exhibits numbered 1 through 20 refer to documents attached to the United States' Request for Admission and an identically numbered set of documents submitted to the trial court subsequent to the hearing on August 28, 1984).

The United States alleged that Appellants individually and doing business as Pryor and Glenn Coal Company conducted a surface coal mining and reclamation operation in Campbell County, Tennessee. The United States

issued two notices of violations and three cessation orders against the Defendants.

NOV 79-2-12-36 carried with it a civil penalty in the amount of $13,500.00 (J.A., p.4). CO 79-2-12-18 carried with it a civil penalty in the amount of $3,500.00 (J.A., p.4,5) NOV 80-2-10-16 carried with it a civil penalty of $2,800.00 (J.A., p.3) CO 80-2-10-4 carried with it a civil penalty of $135,000.00 (J.A., p.6). CO 80-2-23-14 carried with it a civil penalty in the amount of $45,000.00 (J.A., p.7)

NOV 79-2-12-36 was issued for alleged violations on October 10, 1979 (Exh. 1, Plaintiff's Request for Admissions, hereinafter referred to as Pl. Ad., J.A., p.95). CO 79-2-12-18 was

also issued on October 10, 1979 (Exh. 2, Pl.Ad., J.A., p.151). NOV 80-2-10-16 was issued for alleged violations on March 31, 1980 (Exh. 3, Pl.Ad., J.A., p.158). CO 80-2-10-4 was also issued on March 31, 1980 (Exh. 4, Rl.Ad., J.A., p.168). CO 80-2-23-14 was issued on May 6, 1980 (Exh. 5, Pl.Ad., J.A., p182).

Except for the initial NOV's and CO (Exhs. 1 and 2, Pl.Ad.) which on their face show attempted personal service, the United States attempted to personally serve the Appellants with the documents on which it based its claims for civil penalties in the amount of $199,800.00.

The United States unsuccessfully attempted to serve the Notice of Violations, Cessation Orders, Proposed Notice of Assessments and Final Orders

by mail. (See, generally Defendants' Request for Admission and the United States' Response thereto) (J.A., p.126, 132). NOV 79-2-12-36 and CO 79-12-18 were addressed to Pryor and Glenn Coal Company, Route 1, Duff, Tennessee, 37729 and returned "refused". (See, Defendants' Request No. 1 and corresponding response) (J.A., p.126,132). NOV 80-2-10-16 was addressed to Glenn McCullah at 515 W. Elm Street, LaFollette, Tennessee, 37766 and returned "unclaimed" and was also sent to the Route 1, Duff, Tennessee, address and returned "refused." (Request No. 2 and corresponding response) (J.A., p.125, 132). CO 80-2-10-4 was addressed to Glenn McCullah at the 515 W. Elm Street address and returned "unclaimed" and was also sent to the Route 1, Duff,

Tennessee, address and returned "refused" (Request No. 3 and corresponding response) (J.A., p.127, 132). CO 80-2-23-14 was addressed to the 515 W. Elm Street address and was returned "unclaimed" and was also sent to the Route 1, Duff, Tennessee, address and was returned with the notation "out of business" (Request No. 4 and corresponding response). The five (5) Notices of Proposed Assessments on the NOV's and CO's were all sent to the Route 1, Duff, Tennessee, address and no attempt was made even by mail to send them to the 515 W. Elm Street address of Glenn McCullah (Requests 4 through 9 and corresponding responses and Request No. 11 and corresponding response) (J.A., p.128,132). The United States admitted that the envelopes containing Notices of

Proposed Assessments for the CO 80-2-10-4 and CO 80-2-23-14 were incorrectly addressed to "Pryor and Gleen Coal Company" (Request No. 18 and corresponding response) (J.A., p.130, 133).

The Appellants deny being served or notified of the violations or notices of assessments upon which the United States sought and recovered judgment (See Affidavits of Pryor Bolton P. 1 and Glenn McCullah Pgs. 1 and 2 filed April 27, 1984) (J.A., p.83, 90). The Appellants also averred that they dissolved the partnership of Pryor and Glenn Coal Company after they were unable to receive permitting for the mine site in question. (McCullah Affidavit P. 1 filed September 7, 1984 and Bolton Affidavit P. 1 filed

September 18, 1984) (J.A., p.135, 137). Further, subsequent to the dissolution of the partnership, neither Appellant was authorized to accept service for the other nor was anyone else authorized to do so (McCullah Affidavit P. 2, filed September 7, 1984 and Bolton Affidavit P. 2, filed September 18, 1984) (J.A., p.136, 138).

Appellants averred that they were not apprised of the United States' efforts to collect civil penalties when they appeared in a separate civil action relating to the same minesite and that reclamation work required of them was prevented with the knowledge of the United States. (Bolton Affidavit Pgs. 1, 4, 6 and McCullah Affidavit Pgs. 1, 3, 4 filed April 27, 1984) (J.A., p.84, 90). Bolton did not know the inspectors

who claimed to have attempted service on him. (Bolton Affidavit Pgs. 2, 3 filed April 27, 1984). McCullah has known one of the inspectors involved with the issuance of the notices of violations and cessation orders but was never contacted by him. (McCullah Affidavit Pgs. 2, 3 filed April 27, 1984) (J.A., p.91, 92).

ARGUMENT

INTRODUCTION

The Appellants were never served with the notices of violation, cessation orders, and notices of assessments and did not even learn of the notices of violations and cessation orders until it was too late to appeal or contest them. The suit therefore should have been dismissed.

The United States alleges that the Appellants violated certain provisions of the Act relating to a surface mining operation in Campbell County, Tennessee, in late 1979 and early 1980. The United States contends that the Appellants were issued two (2) separate notices of violation and three (3) separate cessation orders for the alleged

violations, but failed to pursue the administrative remedies provided under the Act to contest either the fact of the violation(s) or the amount of penalties subsequently assessed thereon.

I. Failure of Appellants to be notified in a timely and meaningful manner of the alleged violations and assessments.

The United States simply failed to serve the Appellants with the notice(s) of violations, cessation order(s), and notices of proposed assessments for which the United States received judgment for civil penalties. Moreover, the United States failed to make a serious effort to notify Appellants despite the fact that United States knew the addresses of both of the Appellants and had inspectors that lived in close proximity to them. (See Affidavits of

Bolton and McCullah filed April 27, 1984) (J.A., p.83,90).

The preferred method of service in any judicial or administrative action is personal service upon the party charged. For example, Rule 4 of the Federal Rules of Civil Procedure requires that a summons and complaint be served upon an individual, personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process. FRCP 4(d)(1). A recent amendment to Rule 4 authorises service by mail, but unless receipt is acknowledged on a form required for such purpose service must

be made "in the manner prescribed by subdivision (d)(1) or (d)(3)." FRCP 4(c)(2)(c)(ii). In this case, United States can show no personal service upon the Appellants nor has it shown that personal service was even attempted except for the initial NOV and CO. Further, despite the fact that the notices and orders sent to Appellant Bolton's address were all returned to the United States, the United States continued to use this obviously ineffective means of "service".

To grant Judgment as a matter of law under the facts and circumstances of this case constituted a violation of Appellants' Due Process rights. It is elementary that one cannot be held to answer to defend an action unless duly notified of the need to answer and

defend.

> 'The fundamental requisite of due process of law is the opportunity to be heard'... This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose himself whether to appear or default, acquiesce or contest. Mullane v. Central Hanover Bank and Trust Company, 339 US 306, 314, 70 S. Ct. 652, 657, 94 L.Ed 865, 873 (1950).
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> Id.

The April 27, 1984 affidavits of Pryor Bolton and Glenn McCullah in summary reveal the following:

1. Neither Bolton nor McCullah were ever personally served by

representatives of the Office of Surface Mining with the notices of violation, cessation orders, or proposed assessments.

2. Neither Bolton nor McCullah ever knowingly refused any of the notices of violations, cessation orders, or proposed assessments.

3. No one was authorized to accept service on behalf of Bolton or McCullah.

4. Neither McCullah nor Bolton were present at the mine site in question beyond November 1979. Neither man authorized or participated in any activity or disturbance at the site beyond November, 1979.

5. Bolton and McCullah were made aware too late that notices of violations and cessation orders had been issued, and did not learn that penalties

of nearly $200,000.00 had been assessed or were being sought from them until the instant action.

II. Unconstitutionality of the notice provisions of 30 CFR Sec. 722.14 and 30 CFR Sec. 723.17

The regulations governing the service of notices of violations, cessation orders and notices of proposed assessments and the acts and/or omissions of the United States in attempting to serve notice in this case fail to meet the minimum standards of due process laid down by the United States Supreme Court. The manner of service of notices of violations and cessation orders is set forth in 30 CFR Sec. 722.14, which provides in pertinent part:

> (a) A notice of violation or cessation order shall be

served on the person to whom it is directed or his designated agent promptly after issuance, as follows:

(1) By tendering a copy at the Surface Coal Mining and Reclamation Operation to the designated agent or person to whom it is directed. If no such agent is reasonably available, a copy may be tendered to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge of the Surface Coal Mining and Reclamation Operation referred to in the notices or orders. If no such individual can be located at the site, a copy may be tendered to any individual who appears to be an employee or agent to whom the order or notice is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.

(2) As an alternative to Paragraph (a)(1) of this section, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender

> of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

The manner of serving the proposed assessment is set forth in 30 CFR Sec. 723.17, which provides in pertinent part:

> (b) The office shall serve a copy of the proposed assessment and a copy of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail within thirty (30) days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under 30 CFR 715.12 (b) or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender.

Paragraph (a)(1) of Section 722.14 purports to make service complete even

upon the refusal to accept service by an individual on the mine site, whether there is any connection shown between the individual and the person to whom the violation is directed, whether there has been any showing that the person alledgedly in violation is in fact conducting operations at the particular mine site, or whether the individual is authorized to accept service. Under the provisions set forth in Paragraph (a)(1) of Section 722.14, an individual unconnected with the person allegedly in violation would have neither a duty nor an incentive to accept service or notify the alleged violator that he or she was being charged with violating the Act at that particular mine site. Such fears were expressed by persons commenting on the proposed rule. See, 45 FR 2626,

discussed, infra.

More important are the provisions of Paragraph (a)(2) of Section 722.14, which purport to make service complete by sending a copy of the notice or order by certified mail regardless of actual notification and in the absence of even an attempt at actual notification. Further, Paragraph (a)(2) purports to make service complete upon the tender and refusal of mail without regard to the possibility that the name or address on the mail is incorrect or that the mail may be refused by any number of individuals.

A notice of a proposed assessment, of course, cannot be served on an alleged violator until a notice of violation or cessation order has been issued. See, 30 USC Section 1268(c).

Paragraph (b) of Section 723.17 provides that certified mail is the only manner in which a notice of proposed assessment needs to be served upon an alleged violator. Paragraph (b) is fatally defective even though it attempts to be more explicit that Paragraph (a)(2) of Section 722.14 as to whom the mail is to be sent. Paragraph (b) of Section 723.17 first presumes that the person actually violating the act has posted a sign as required under 30 CFR Sec. 715.12(b) and further presumes that such actual violator has listed his own name and address.

The omissions of the United States in this case, by failing to follow up on known lack of information as to the actual violators at the mine site in question and known defects in attemps at

service, serve only to compound the unconstitutionality of 30 CFR Sec. 722.14 and 30 CFR Sec. 723.17. If the United States suspected the Appellants in this case of violating the Act, personal service upon the Appellants should and could have been easily obtained through only a minimal effort.

One of the United States' authorized representatives in this case personally knew Defendant McCullah and resides near the long-established residences of both Appellants. (McCullah Affidavit Pgs. 2, 3, filed April 27, 1984) (J.A., p.91, 92). Having failed to make personal service in this case, and having been notified from the very beginning that attempted service by mail was ineffectual, the United States continued to repeat the

error without further inquiry.

The classic form of adequate notice in any proceeding has been personal service of written notice. Mullane v. Central Hanover Bank and Trust Company, 339 US 306, 313, 70 S.Ct. 652, 657 94 L.Ed. 865, 873 (1950). Resort to substituted service such as publication or, the mails, as in this case, is constitutiionally efficacious only in cases where the person sought to be warned is missing or unknown. Id. 339 US at 317, S.Ct. at 658, L.Ed. at 875. Such is not the case here.

Two recent United States Supreme Court cases grounded on the constitutional due process standards of Mullane, supra, point to the constitutional infirmaties of the regulations under review and the acts

and omissions of the United States in this case. Even in cases involving actions on real property, posting of notice upon the real property itself does not necesarily satisfy minimum standards of due process, prticularly if the realities of the circumstances involved in the case indicate that notice has been inadequate. Greene v. Lindsay, 456 US 444, 102 S.Ct. 1874, 72 L.Ed. 2d 249, (1982). In Greene, supra, the Court was concerned with eviction proceedings in which the standard use of posted notices on apartment doors frequently proved ineffective and in which personal service was generally attempted only once. The Court noted that in previous decisions, where "practical obstacles to providing personal service" were involved, that it

had "allowed judicial proceedings to be prosecuted insome situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service." Id. US at 449, S.Ct. at 1878, L.Ed. at 255. Quoting Mullane, supra, the Court further stated that due process requied that "notice [be] reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id.

Further, the Court in Greene noted that the nature of an action has a "bearing on a constitutional assessment of the reasonableness of the procedures employed." Id., US at 450, 451, S.Ct. at 1978, 1979, L.Ed 2d at 255, 256.

> The character of the action reflects the extent to which the Court purports to extend its power, and thus may roughly describe the scope of potentional adverse consequences to the person claiming a right to more effective notice. Bur "[a]ll proceedings like all rights, are really against persons." In this case, appellees have been deprived of a specific interest in property: indeed of the right to continued residence in their homes... The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutionality of a procedure established by the state to provide notice in a particulr class of cases "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted."
>
> Id.

In the instant case, the United States sought and received a money judgment from the Appellants in an

amount which would deprive the Appellants of every worldly possession, including their homes, as well as deprive the Appellants of their very livelihood. This is more important since these civil penalties are not dischargeable in bankruptcy. See, 11 USC 523. The Court went on in Greene to note that where personal service was ineffectual "notice by mail may be reasonably relied upon to provide interested persons of actual notice of judicial proceedings." Id. US at 455, S.Ct. at 1881, L.Ed 2d at 258. However, the Court made it clear that although the mail service might be used to "enhance the reliability of an otherwise unreliable notice procedure", the "continued exclusive reliance on an effective means of service is not notice

'reasonably calculated to reach those who cold be easily informed by other means at hand'." Id.

In the instant case, personal service was not employed when it easily could have been obtained. The United States relied solely on service by mail despite the fact that each of the letters was returned marked "refused" or "unclaimed". The United States never even attempted to serve McCullah by mail or otherwise after May of 1980. Further, in the instant case, it is not the real property of the Appellants which is the subject of controversy, but an action against them personally based upon mailed notices upon which after the initial NOV and CO in October 1979 the United States exclusively relied.

When a proceeding will adversly

affect the liberty or property interest of a person, notice by mail fails to meet the minimum constitutional requirements o due process when it does not insure actual notice. Mennonite Board of Missions v. Adams, 462 US 791, 103 S.Ct. 2706, 2712, 77 L.Ed 2d 180, 188, (1983). Given such facts of this case, the regulations and the United States' ineffectual attempts at service pursuant thereto failed to meet the minimum constitutional requirements of due process.

Leading cases addressing service of process by mail generally were decided in the context of nonresident corporations or motorists. E.g., Hess v. Pawloski, 274 US 352, 47 S.Ct. 632, 71 L.Ed 1091; Flexner v. Farson. 248 US 289, 39 S.Ct. 97 63 L.Ed 250 (1919);

Henry L. Dohrety and Co. v. Goodman, 294 US 628, 55 S.Ct. 554 L.Ed 1100 (1935); Wuchter v. Pizzutti, 276 US 13, 48 S.Ct. 259m 72 L.Ed 446, (1928). In Hess, supra, the Supreme Court upheld the constitutionality of a state statute conferring jurisdiction over a nonresident motorist by the device of the nonmotorist's implied consent to the appointment of a state official for the acceptance of service of process. However, critical to the decision in the Hess case was the following language included in the statute under review:

> ...Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliane herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant

> reasonable opportunity to defend the action.

Id. US at 354, 356, S.Ct. at 633, L.Ed. at 1094. Further, a law which purports to make service complete upon an implied designated agent, without a provision providing that the designated agent shall communicate such notice to the real defendan, is unconstitutional. Wuchterv. Pizzutti, supra, US at 19, 48 S.Ct. at 260, 72, L.Ed at 449 (1928).

The fiction of implied consent to service of process upon an alleged agent under a statute purportedly authorizing such service does not apply to individual nonresidents doing business in the state. Flexner v. Farson, 248 US 289, 39 S.Ct. Reporter 97, 63 L.Ed. 250 (1919). In Flexner, the Supreme Court upheld a ruling by the Illinois Supreme Court declaring a Kentucky statute

unconstitutional which purported to authorize such service and that a judgment founded upon such service was void. Id., US at 293, S.Ct. at 98, L.Ed. at 253. Thus, as applied to individual operators, 30 CFR 722.14(a) is unconstitutional under the rationale of Flexner, supra. Quite a different situation arises where the defendant has established a business and an office in a particular office, and has registered upon a state official, who in turn must provide such agent with actual notice. Henry L. Doherty and Co. v. Goodman, 294 US 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1935).

Under such circumstances, a statute providing for service on one other than the Defendant may withstand constitutional objections because

"...there is not only reasonable probability, but practicable moral certainty that the defendant will receive actual notice of the pendency of the action." Id. US at 627, S.Ct. 554, L.Ed. at 1099. 30 CFR Sec. 722.14 does not provide with such certainty that actual notice of an alleged violation will be given to an operator. The facts in the instant case show that there was no agent, real or implied, upon whom service could be made on behalf of the Appellants and that in fact Appellants did not receive actual notice of the alleged violations, cessation orders and proposed assessments.

The unconstitutionality of 30 CFR Sec. 722.14 is further compounded by the Office of Surface Mining's total disregard of the due process

requirements set forth by the United States Supreme Court in a long line of decisions, supra, and the agency's disregard of objections raised to its provisions based upon the same rationale expressed by the Supreme Court. The text of 30 CFR Sec. 722.14 was set forth as a proposed rule on August 20, 1979. 44 FR 48720. The supplementary information preceding the full text of Section 722.14 included the following:

> The director, Office of Surface Mining, has determined that the proposed modification is not significant and does require the preparation of a regulatory analysis.
>
> The proposed revised Section 722.14, which conforms to similar language in the permanent regulations, Section 843.14, explains in greater detail the manner for service of notices of violations, cessation orders and show cause orders. It also states expressly OSM's interpretation of its existing regulations

> regarding service, namely, that service is complete upon tender and shall not be deemed incomplete because of refusal to accept. Thus, for instance, a person who refuses to accept certified mail is deemed to have been served with that mail. The revised Section 722.14 also provides a mechanism by which agents may be designated for service of these notices and orders. However, service on designated agents is optional -- the Office does not have to serve a designated agent if for instance, it has served the person in charge of the operation.

It seems equally clear that the Office of Surface Mining's explicit view that the modifications governing service of process are "insignificant" have unconstitutionally tainted the agency's regulations and actions taken pursuant to such regulations. The Office of Surface Mining reiterated its lack of concern for service of process when the final rule was published. 45 FR 2626.

For example, the supplementary information preceding the final rule contained the following language:

> ...a person who refuses to accept certified mail is deemed to have been served with that mail. This includes failure to pick up such mail at the post office. Service will be made at the mine site, where possible, but failure to do so will not invalidate proper service by mail.

However, under the Supreme Court's due process decisions, the OSM's interpretation of "proper service by mail" is in fact improper and unconstitutional, and does not provide for actual notice to the Defendant. Valid concerns with the provisions of Section 722.14 were expressed in comments to the proposed modification to Section 722.14:

> Almost every commenter objected to the second sentence of Section 722.14

> (a)(1) which permits service on "any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued," where the designated agent or individual who appears to be in charge cannot be located at the site. The commenters felt that service on such persons often results in a notice or order being lost or never being delivered to a responsible individual who will take proper action. Therefore, the office has changed this subsection.

The supposed change was "pro forma" only and failed to meet the real concern expressed by the commenters and failed to conform the regulation to the substantive due process requirement that the Appellant actually be notified of a pending action. This is particularly evident in light of the addition of the mailing provision added as Subsection (a)(2), the agency's stated view that such modifications relating to service

of process were "insignificant" and that service by mail is complete whether or not service upon the Defendant or a purported agent has first been attempted and whether actual notice was in fact received under section 722.14(a)(2).

It is clear that the OSM's attitude and the regulations promulgated in the shadow of the agency's attitude toward service of process failed to measure up to the standards espoused by the Supreme Court in its decisions:

> Beginning with Mullane, this court has recognized, contrary to the earlier line of cases 'that an adverse judgment in rem directly effects the property owner by divesting him of his rights in the property before the court... In rejecting the traditional justification for distinquishing between residents and nonresidents and between in rem and in personam actions, the Court has not left all interested claimants to the vagaries of indirect

> notice. Our cases have required the state to make efforts to provide actual notice to the interested parties comparable to the efforts that were previously required only in in personam actions.

Mennonite Board of Missions v. Adams, supra, S.Ct. at 2710 n.3, 77 L.Ed2d at 186 n.3, (1983).

Since the instant case is one for collection of a personal money judgment against the Appellants, it is clear that due process was denied to the Appellants under the older Supreme Court decisions reviewing in personam actions and certainly under the recent decisions erasing the due process distinctions between in rem and in personam actions.

Finally, assuming arguendo, as alleged by United States, that the Appellants were furnished with copies of the notices of violation and cessation

orders as attachments to the complaint filed in a separate action in the district court styled United States of America v. Pryor Bolton and Glenn McCullah, Civil Action No. 3-80-320, it would be immaterial. First, purported service by any means other than that authorized by appropriate rule of law is ineffectual. Wuchter v. Pizzutti, 276 USC 13, 24, 48 S.Ct. 259, 262, 72 L.Ed 446, 452 (1928). This is even more true where the rule itself is unconstitutional, as in the instant case. Third, since Civil Action No. 3-80-320 was initiated after the time had run in which the Appellants would have had the opportunity to request public hearings and pursue other administrative remedies under the Act, such notice would be worthless and

constitutionally ineffective. Such "notice" would not provide the Appellants an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 US 319, 333, 96 S.Ct. 893, 902, 47 L.Ed2d 18, 32 (1976).

III. Equitable Principles Bar the United States' Action In This Case or Justify Only a Nominal Penalty.

The Government is not immune from the application of equitable principles. Where allegations of equitable principles are shown to present a valid defense to an action brought by the government, summary judgment in favor of the government is improper. Cf., United States v. Gleaners and Farmers Cooperative Elevator Co., 314 F.Supp. 1148 (N.D. Ind. 1970).

> [W]hen the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government.

Id. at 1150 (citing Walker v. United States, 139 F. 109, 413(M.D. Ala. 1905). Justice requires under the facts of the instant case that the government be barred from obtaining a money judgment against the defendants based upon the equitable principles of estoppel and laches.

The Appellants turn now to the Government's failure to abide by the Act and its own regulations, its untimely delay in notifying the Appellants of the huge amount of the penalties assessed upon the alleged violations and cessation orders, and its failure to apprise the Appellants of its intent to collect such penalties in previous litigation between the parties.

A simple review of the Government's own documents in this case serves to show the Government's lack of adherence to the regulations. On October 10, 1979, NOV No. 79-2-12-36 and CO No. 79-2-12-18 were issued by the Government naming the Appellants as alleged violators of the Act. On March 31, 1980, NOV No. 80-2-10-16 and CO No. 80-2-10-4 were issued in the name of the

Appellants. On May 8, 1980, CO No. 80-2-23-14 was issued.

On November 7, 1979, a notice of proposed assessment of civil penalty in the amount of $13,500.00 was allegedly sent to the Appellants for NOV No. 79-2-12-36. Also, on November 7, 1979, a notice of proposed assessment of civil penalty in the amount of $3,500.00 was allegedly sent to the Appellants on CO No. 79-2-12-18. On April 21, 1980, a notice of proposed assessment of civil penalty in the amount of $2,800.00 was allegedly sent to the Appellants on NOV No. 80-2-10-16.

On May 7, 1982, a notice of proposed assessment of civil penalty in the amount of $135,000.00 was allegedly sent to the Appellants on CO No. 80-2-10-4, over two years after the

issuance of said cessation order. Also, on May 7, 1982, a notice of proposed assessment of civil penalty in the amount of $45,000.00 was allegedly sent to the Appellants on CO No. 80-2-23-14, also two years after the issuance of said cessation order.

The Act requires that:

> Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order... Provided, That any notice or order issued purusant to this section which requires cessation of mining by the operator shall expire within thirty (30) days of actual notice to the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing.

30 USC Sec. 1271(a)(5). Actual notice of each notice or order issued is

required by 30 USC Sec. 1271(a)(5), and the Appellants were not given actual notice of the notices and orders under review in the instant case. It already has been shown that the implementing regulations fail to insure that such actual notice will be given, and in fact they failed to adhere to the requirements of the Act under which they were promulgated.

Likewise, the civil penalties assessed against the Appellants were assessed in blatant disregard of the requirements of the Act. Civil penalties are governed by 30 USC Sec. 1268, which provides in pertinent part:

> (b) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing....

> (c) Upon the issue of a notice or order charging that a violation or Act has occurred, the Secretary shall inform the operator within thirty (30) days of the proposed amount of said penalty...
>
> (Emphasis added).

The United States failed to insure that the Appellants were given actual notice of the notices of violation and cessation orders. Therefore, the Appellants could not avail themselves of their right to an opportunity for a public hearing, and the civil penalties assessed in this case were issued in violation of subsection (b) of 30 USC Sec. 1268. Equally important is the fact that the OSM did not even attempt to serve two civil penalties totalling $180,000.00 on the Appellants until fully two (2) years had passed from the

issuance of the cessation orders upon which the civil penalties were based.

The United States' contention that the civil penalties are nonetheless valid because of the Appellants' involvement in United States v. Pryor Bolton and Glen McCullah, Civ. Action No. 3-80-320 (E.D. Tenn., filed July 22, 1980), is without consequence, particularly regarding the $180,000.00 in civil penalties assessed for cessation order no. 80-2-10-4 and cessation order no. 80-2-23-14. The notices of proposed assessment upon the latter cessation orders were not even issued until nearly two (2) years after the institution of Civil Action No. 3-80-320.

By the time the Government brought Civil Action No. 3-80-320, it already

had failed to insure that the Appellants were given actual notice of the notices of violation and cessation orders and had deprived the Appellants of all administrative remedies. During the course of proceedings in Civil Action No. 3-80-320, the Appellants were lead to believe that the United States would seek no further action against the Appellants based upon the alleged violations and cessation orders other than requiring reclamation work to the mine site in question. The authority in effect to waive the collection of civil penalties is fully within the purview of the Act pursuant to 30 USC Sec. 1271(a)(5), which provides in pertinent part:

> ...Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the

> Secretary or his authorized repesentative.
>
> See also, 30 CFR Section 723.18(b)(3)(ii).

The Government should not be allowed to collect the oppressive civil penalties sought in this case.

> The Goverment can .be estopped by the conduct of its agents within the scope of their authority. The notion that the Government is immune from estoppel is only true when we are presented with an attempted estoppel of the government resulting from the erroneous, illegal, or unauthorized acts of its agents. In these situations, the United States cannot be estopped.
>
> The policy considerations behind these estoppel rules are liked with those providing the rationale for soverign immunity. They reflect a desire to conserve the public treasury and resources held by the government for the use and welfare of us all, from depletion through the oversight and error of a few individuals. But this laudable husbanding of

> resources cannot be carried so far as to permit the government to deal capriciously with its citizens.
>
> Concern with this latter aspect of governmental estoppel has produced commentary highly critical of the harsh rules in this area. Moreover, an increasin number of judicial decisions have demonstrated a changing attitude in the application of estoppel against the government, resulting in its more frequent availability, even where the estoppel is created by unauthorized, improper, or illegal agents' acts.
>
> Oil Shale Corporation v. Morton, 370 F.Supp. 108, 125 (D.Colo.1973).

Equitable principles applied to the facts of this case require that the Government be barred from collecting the oppressive civil penalties awarded by the district court.

Further, a refusal to assert estoppel against the government by no

means prevents the court from affording the Appellants relief based upon the circumstances which otherwise would raise the grounds for estoppel. When estoppel is rejected as to the government in a civil penalty proceeding, the circumstances should entitle the government to nothing more than a nominal award. United States v. American Greeting Corp., 168 F.Supp. 45 (N.D. Ohio 1958) aff'd per curiam, 272 F2d 945 (6th Cir. 1959). Finally, the Defendant's financial ability to pay any penalty is a factor for the court's consideration in determining the amount of any penalty. United States v. Ancorp National Services, 367 F.Supp. 1221 (S.D.N.Y. 1973).

Therefore, the trial judge was misinformed by counsel for the United

States when he inquired about his discretion involving the amount of the penalty at the hearing August 28, 1984. (Tr. 11).

IV. Equal Protection Argument

Under the circumstances of this case, the Government cannot defeat an equal protection attack simply by meeting the rational basis test. Because of the fundamental rights which have been interferred with a strict scrutnity analysis necessary. Regan v. Taxation With Representation Of Washington, 461 US 540, 103 S.Ct. 1997, 76 L.Ed2d 129 (1983). The implementing regulations on their face and as applied, relating to the fundamental rights of notice and the opportunity to be heard, cannot withstand a constitutional challenge, whether based

upon a rational or a strict scrutiny analysis.

Further, the prepayment provision of 30 USC Sec. 1268(c) is invalid on its face and as applied to the circumstances of the instant action. The presumption and policy in favor of reviewability of agency action is very strong. Abott Laboratories v. Gardner, 387 US 136, 87 S.Ct. 1507, L.Ed2d 681 (1967). The Department of Interior is an executive department specifically subject to review under the Administrative Procedure Act. See, 5 USC Sec. 101, Sec. 551, and Section 702. Section 1268(c) of title 30 restricts access to the courts unreasonably and is in conflict with the statutory presumption of review given to all litigants coming within the purview of 5 USC Sections 701

through 706.

Although the words of a particular statute may presumptively preclude review of certain facts or conclusions, a constitutional challenge to the statute upon which agency action is predicated is not barred because of such presumptive unreviewability. Johnson v. Robison, 415 US 361, 367, 97 S.Ct. 1160, 1166, 39 L.Ed2d 389, 398, (1974). Prepayment in full of a civil penalty as a condition to receive review of alleged arbitrary, capricious, illegal or unconstitutional agency action, is an undue burden on the defendants' statutory right to review and cannot be sustained. Lindsay v. Normet, 405 US 56, 76-78, 92 S.Ct. 862, 875-877, 31 L.Ed2d 36, 52-53 (1972).

In effect, the prepayment

provisions of the Act create an invalid distinction between alleged violators who can afford to pay the full amount of an assessed civil penalty and are allowed judicial review and those who cannot afford to pay and, therefore, are barred from seeking redress. The legitimate interest the Government may have in conditioning access to the courts on prepayment of filing fees in order to defray the cost of administration is not served by requiring prepayment of a civil penalty. A filing fee may be raised relatively easily regardless of financial condition and is a mere pittance in comparison with a civil penalty of $200,000.00. Therefore, cases upholding payment of filing fees even from indigent persons are inapposite. See, e.g., United

States v. Kras, 409 US 434, 93 S.Ct. 631, 34 L.Ed2d 626 (1973).

Equally in opposite are cases upholding requirements that alleged tax liability be prepaid in order to challenge the assessment of the challenged amount. In such cases, there is a strong presumption that the disgruntled taxpayer has financial resources necessary to make prepayment because the liability itself is based upon the income or assets of the taxpayer. A civil penalty in no way reflects the alleged violator's ability to pay. Likewise, conditioning access to the court upon prepayment of a full civil penalty without providing an alternative for one who cannot afford to prepay is a violation of equal protection. Such a failure is a

deprivation of a fundamental and significant right and, as in the due process context, is constitutionally impermissable.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition be granted.

RESPECTFULLY SUBMITTED, this the 24 day of February, 1986.

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APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff/Appellee,)
v.) ORDER
)
PRYOR BOLTON and GLEN McCULLAH)
d/b/a PRYOR AND GLEN COAL CO.,)
)
Defendants/Appellants.)

BEFORE: MARTIN, JONES and WELLFORD, Circuit Judges.

PER CURIAM. Defendants, Pryor Bolton and Glenn McCullah, d/b/a Pryor and Glenn Coal Company (P&G Coal), appeal from a final judgment entered in favor of the United States for $199,800 plus interest in this action for the collection of civil penalties assessed against defendants pursuant to 30 U.S.C. Sec. 1268(d), a part of the Surface Mining Control and Reclamation Act of 1977 (Act).

The district court, after granting partial summary judgment to the United States on the various issues of law before the court, set for trial the factual issue of whether defendants had received notice of asserted violations and cessation orders.

This case involves civil penalties assessed against Bolton and McCullah for

violations of the Act, based on two notices of violations (or "NOVs") and three cessation orders (or "COs") issued by the Office of Surface Mining (OSM) of the Department of the Interior in 1979 and 1980. On July 22, 1980, a civil action was filed against defendants under Section 521(c) of the Act, 30 U.S.C. Sec. 1271(c), to compel their compliance with the five prior notices and orders involved in this case. On November 1, 1983, the district court ordered the defendants to perform certain remedial work at the mine site in question and entered an injunction against future surface coal mining operations not in compliance with the Act.

The complaint in this prior action,as well as defendants' answer and the district court's order, set out the facts surrounding the attempts at service of the five notices of violation and cessation orders on defendants.

Defendants' answer does not raise any objection with respect to the government's means of service. Because this prior action was for an injunction, the government did not articulate in its complaint the facts surrounding the attempted service of the notices of proposed assessment, some of which were served prior to the action's commencement.

Proposed assessments of civil penalties for these citations were sent to defendants in 1979 and 1980. Defendants did not take an administrative appeal from the proposed assessments and to OSM issued final orders requiring payment of the amount of controversy. Defendants did not pay the penalties and, on January 3, 1984, OSM filed this collection action, which is the subject of this appeal. Defendants raise several legal challenges to the collection action, specifically challenging the constitutionally of the service of the

citations in question by certified mail. In its order of May 24, 1984, the district court found that notice by certified mail, as provided by 30 C.F.R. Sec. 722.14(a) and 723.17(b) (1984), was constitutionally adequate. Determining that "[i]t is reasonable to assume that if persons refuse to accept delivery or collect their mail, the mail has in fact reached them," the court upheld the provisions of the regulations which find adequate service where there is refusal to accept delivery. The court rejected defendants' argument that OSM's delay in assessing penalties estopped the United States from filing a collection action against them, relying on United States v. Log Mountain Mining Co., 550 F.Supp. 811 (E.D. Tenn. 1982), aff'd without opinion sub nom. United States v. Moore,

734 F.2d 17 (6th Cir. 1984), cert. denied, 105 S.Ct. 247. The trial court also found defendants' equal protection argument meritless. Reserved for trial was the question whether defendants received sufficient notice of the five citations upon which the assessments are based.

Defendants submitted a surface mining permit application to the Tennessee Division of Surface Mining under the P&G Coal name as a partnership. Because the initial application was incomplete, the application was merely stamped "received" by the state office on September 21, 1979. Each defendant's home address was given in the application, Bolton's address being given as P&G Coal's address.

Even before the complete application was submitted, defendants had commenced mining operations contrary to law. A state inspecton report dated October 4, 1979, indicates that mining activity was in progress as early as September 5, 1979. A cease order was issued by state inspectors on September 25, 1979.

On October 10, 1979, representatives of the Secretary of State of the Interior inspected P&G Coal's operation in response to the state inspection report and cease order. At the conclusion of their inspection, the Secretary's representatives issued the first Cessation Order for mining without a permit and the first Notice of Violation for several performance standard violations. Copies of both

documents were tendered to Bolton at the mine site, but he refused to accept them. Copies of the documents were also sent by certified mail to P&G Coal at its address given in its permit application. They were returned marked "refused". Copies of the documents were then sent by regular mail to the same address, and they were not returned.

On November 7, 1979, the OSM Assessment Office sent P&G Coal notices of the proposed assessment of civil penalties for the prior violations cited in the COs and NOVs. The notices of proposed assessment were likewise sent by certified mail to the address for the company stated in the permit application and, again, refused.

Later, a helicopter overflight of the mine site showed that the operation

was still in progress, in violation of the CO. The next year a follow-up inspection of the mine site revealed that the operation had been abandoned without reclamation, in violation of the applicable law. Another CO was issued for defendants' failure to abate the violations previously cited in a NOV. Another NOV was issued for dfendants' failure to reclaim and restore their mine site.

Copies of the new citations were also sent by certified mail to each defendant. Bolton's were returned marked "refused", while those sent to McCullah were returned marked "unclaimed". Both sets of documents were then mailed again to each defendant by regular mail.

Notice of proposed assessment for

the last NOV was sent by certified mail to P&G Coal's address, and it was returned marked "out of business".

On May 6, 1980, a second follow-up inspection revealed that the site remained abandoned and unreclaimed. A representative of the Secretary therefore issued still another CO for defendants' failure to abate the violations cited in the previous nov, and the described procedure was again followed. The copy sent to Bolton was returned marked "out of business", while the copy sent to McCullah was returned marked "unclaimed". Notices of proposed assessment for the latest COs were sent by certified mail to P&G Coal's address and returned as "refused".

Both a final order of penalty assessment and a final demand letter

were issued in 1981 and 1982 for each of the five proposed penalty assessments. Each of the ten documents, then, was sent by certified mail to the P&G Coal address given in the permit application, and each of them was returned marked "refused".

Defendants called no witnesses at the hearing, but rather informed the court through their attorney that "Mr. Bolton... did not specifically refuse the [Notice of Violation]. It was his practice to specifically refuse any and all certified mail regardless of the identity of the sender..." Affidavits submitted by the defendants at the request of the district court stated that Bolton and McCullah "dissolved their partnership ... in November of 1979" and that after such dissolution

neither had "authority to accept notice on behalf [of the other]."

The Act provides for issuance of cessation orders and assessment of civil penalties against any permittee who violates the Act. 30 U.S.C. Sec. 1268(a). The person charged with a violation may contest the charge in administrative and judicial proceedings by forwarding the proposed amount of the penalty to the Secretary of the Interior. 30 U.S.C. Sec. 1268(c). Failure to forward the money to the Secretary to be placed in escrow within 30 days from notice of the proposed penalty results in forfeiture of all legal rights to contest the violation or the amount of the penalty. Id.

This provision, not directly at issue here but mentioned in defendants' Brief, has withstood constitutional challenges. See, Blackhawk Mining Co.

v. Andrus, 711 F.2d 753 (6th Cir. 1983); Graham v. Office of Surface Mining Reclamation and Enforcement, 722 F.2d 1106 (3d Cir. 1983) (citing cases).

Regulations promulgated by the Secretary set forth the procedure for service of notices of violation and cessation orders and are set forth in pertinent part:

> (a) A notice of violation or cessation order shall be served on the person to whom it is directed or his designated agent promptly after issuance, as follows:
>
> (1) By tendering a copy at the surface coal mining and reclamation operation to the designated agent or to the person to whom it is directed. If no such agent is reasonably available, a copy may be tendered to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge of the surface coal mining and reclamation operation referred in the notice or order. If no such individual can be located at the site, a copy may be tendered to any individual at

> the site who appears to be an employee or agent of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.
>
> (2) As an alternative to paragraph (a)(1) of this section, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designed agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

30 C.F.R. Sec. 722.14(a)(1)-(2) (1985) (emphasis added). The regulations also provide for the service of notices of assessment of civil penalties in a similar manner:

> (b) The Office shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment to the person to whom the notice or order was

> issued, by certified mail, within 30 days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under 30 CFR 715.12(b) or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender.

30 C.F.R. Sec. 723.17(b) (1985) (emphasis added).

The district court also noted:

> Postal service regulations provide that "[c]ertified mail...will be delivered to the addressee or his authorized representative." Domestic Mail Manual, Chapter 9, Subchapter 910, Par 912, Sec. 912.51 (Issue 13,December 29, 1983), incorporated by reference in 39 CFR Sec. 111.1-111.5 (1983) (hereinafter DMM). If for any reason, the carrier cannot deliver the certified article, he leaves a notice or arrival at the address and the article is held at the post office for the addressee. DMM Sec. 912.55. If the article is not

> called for within 5 days, a second notice is issued. Id. If the article is not called for within 5 days, a second notice is issued. Id. If the article is not called for or redelivery requested, the article is returned to the sender.

The district court found that defendants' willful evasion was the basis of their failure to receive the notices and assessments here involved. Defendants argue, nevertheless, that because they were unaware of the assessment of civil penalties against them, they were unable to contest them administratively within the statutory time limit. Since Sec. 722.14(a) and 723.17(b) permitted this circumstances, the defendants argue that these regulations are unconstitutional as violative of due process.

Addressing the constitutionality of

the regulations authorizing service of notice by certified mail and deeming such service complete where the recipient refuses to accept, to district court wrote:

> ...Assuming the address is correct and the addressee is not attempting to evade service, it is reasonable to assume that under most circumstances [certified] mail will reach the addressee. Thus, service of notice of the violations and penalties by certified mail is reasonably calculated under the circumstances to provide interested parties with notice, as required by due process. The provisions of the regulations which state that service of notice is not made incomplete by refusal to accept delivery or to collect mail does not render the regulations unconstitutional. It is reasonable to assume that if person refuse to accept delivery or collect their mail, the mail has in fact reached them. See, Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987, (4th Cir. 1981). For the foregoing reasons the Court

> finds the regualtions constitutional and grants summary judgment on the issue of law for plaintiff. However, because defendants say they never received notice of the violations and penalties, the Court believes this factual issue must be tried. If in fact defendants would be entitled to cntest the fact of violation and the amount of penalty at an administrative hearing, as provided by 30 U.S.C. Sec. 1268(c).

Defendants seek to challenge this holding by reference to Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950); Greene v. Lindsay, 456 U.S. 444 (1982); and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). We find defendants' contentions unpersuasive and affirm the district court's conclusions.

In Mullane, the Supreme Court upheld notice by publication in some circumstances and enunciated the

standard for constitutionally adequate service of process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.] The notice must be of such nature as reasonably to convey the required information, [citation omitted] and it must afford a reasonable time for those interested to make their appearance [citations omitted]. But if with due regard for the practicalitiesand peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivably injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." American Land C. v. Zeiss. 219 U.S. 47, 67; and see Blinn v. Nelson, 222 U.S. 1, 7.

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The rerasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected [citations omitted], or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

339 U.S. at 314-15 (emphasis added). Greene followed the strictures of Mullane by striking down a forcible entry or detainer statute which merely provided for service of process by posting a summons on the tenant's door.

> In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a

> procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).

456 U.S. at 451. The Court in Greene also expressly approved the use of mail service in context of tenants. See, 456 U.S. at 455. In Mennonite Board of Missions, the Court struck down a law requiring publication notice of a tax sale of real property to a known mortgagee where service by mail was possible, but in this case, as in Mullane and Greene, service by mail was approved.

None of the cases cited by defendants, moreover, contemplate a set of circumstances present here where the party raising the due process claim has

earlier attempted to thwart the very notice he complains about not receiving. One case cited by the district court deals with the similar issue. In Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987, 990 (4th Cir. 1981) when there was service of process by certified mail returned marked "refused," the court found no due process violation. We agree with the rationale.

We detect no clearly eroneous finding made by the district court, and as noted, we agree with the conclusions reached as to each defendant. It is of particular significance that defendants were parties to an action by the government for an injunction involving the five notices and orders which form the basis for the assessments on which

this collection action is based. They may be presumed to be aware of the governement's actions and the basis therefor apart from their willful evasion.

Defendants argue that the penalties here asserted are void because the government failed to abide by the statutory scheme, because of failure to inform them of the proposed penalty within 30 days. 30 U.S.C. Sec 1268(c). United States v. Log Mountain Mining Co., 550 F.Supp. 811 (E.D. Tenn. 1982), aff'd without opinion sub nom. United States v. Moore, 734 734 F.2d 17 (6th Cir. 1984), cert. denied, 105 S.Ct. 247 is dispositive on this issue, and we accordingly find no basis defendants' contention.

30 U.S.C. Sec. 1268(c) provides in pertinent part:

> Upon the issuance of a notice or order charging that a violation of this chapter has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account.
>
> (Emphasis added).

Finally, the defendants argue that 30 U.S.C. Sec. 1271(a)(5) operates against imposition of the penalties, citing a portion of that section:

> ...[a]ny notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice to the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be

> conducted during the course of public hearing.

We read this part of the statute to provide that a cessation order expires within 30 days of "actual notice". It does not require personal service as argued by defendants.

Defendants' estoppel and laches argument is without merit as well. The defendants do not allege what acts they undertook to their prejudice in reliance upon the government's alleged delay in prosecution. See Sigmon Fuel Co. v. Tennessee Valley Authority, 531 F.Supp. 80, 82 (E.D. Tenn. 1982), rev'd on other grounds, 709 F.2d 440 (6th Cir. 1983). We affirm the district court's judgment in all respects.

MANDATE ISSUED: December 20, 1985.
ENTERED BY ORDER OF THE COURT
/s/By: John H. Hehman, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
v.) CIV.
)
3-84-14
PRYOR BOLTON and GLEN McCULLAH)
d/b/a PRYOR AND GLEN COAL CO.,)

MEMORANDUM

Plaintiff, United States of America brings this civil action to recover civil penalties assessed against defendants pursuant to the Surface Mining Control and Reclamation Act of 1977 [the Act], 30 U.S.C. Sec. 1201 et. seq. This case is before the Court on cross-motions for summary judgment.

The Act provides for issuance of cessation orders and assessment of civil penalties against any permittee who violates the Act. 30 U.S.C. Sec. 1268(a). The person charged with a

violation may contest the charge in administrative and judicial proceedings by forwarding the proposed amount of the penalty to the Secretary of the Interior. 30 U.S.C. Sec. 1268(c). Failure to forward the money to the Seretary within 30 days from notice of the proposed penalty shall result in forfeiture of all legal rights to contest the violation or the amount of the penalty. Id. The Secretary's regulations provide that a notice of violation or cessation order shall be served promptly after issuance, as follows:

> (1) By tendering a copy at the surface coal mining and reclamation operation to the designated agent or to the person to whom it is directed. If no such agent is reasonably available, a copy may be tendered to the individual who, based upon reasonably inquiry by the authorized

> representative, appears to be in charge of the surface coal mining and reclamation operation referred to in the notice or order. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete upon tender of the notice or order and shall not be deeded incomplete because of refusal to accept.
>
> (2) As an alternative to paragraph (a)(1) of this section, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or is designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall no be deemed incomplete because of refusal to accept.

30 C.F.R. Sec. 722.14(a)(1)-(2) (1983). The regulations also provide that the proposed assessment of civil penalties

shall be served as follows:

> (b) The Office shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under 30 CFR 715.12(b) or at any address at which that person is in fct located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender.

30 CFR Sec. 723.17(b) (1983).

Defendants say they were not served or notified of the violations or notices of assessments upon which this action is based. (Affidavits of Pryor Bolton and Glenn McCullah). Defendant McCullah says he was not aware of the assessment of civil penalties until this lawsuit

was brought in January 1984. (Affidavit of Glenn McCullah at 3). Defendant Pryor Bolton said he was aware of the assessment of civil penalties until late 1983. (Affidavit of Pryor Bolton at 2). Defendants say, because they were unaware of the assessment of violations and penalties, they were unable to contest administratively, within the statutory time limit, the assessments and now are precluded by statute from contesting judicially the assessments. Thus, defendants say they have been denied their due process right to notice and an opportunity to be heard prior to this action to collect civil penalties. Defendants say they are entitled to summary judgment.

Plaintiff says defendant Bolton was personally served at the mine site with

notice of violation 79-2-12-36 and cessation order 79-2-12-18, which defendant Bolton refused to accept; that cessation orders 79-2-12-18, 80-2-10-4 and notices of violation 79-2-12-36 and 80-2-10-16 were mailed to defendants by certified mail and were returned "refused", "unclaimed" or "out of business"; and that the notices of violations and cessation orders were then mailed by regular mail to defendants and were not returned. (Affidavit of Charles G. Wofford). Plaintiff further says that notices of proposed assessment and letters of final order and final demand for each notice of violation and cessation order were mailed by certified mail to defendants and were returned "refused". (Affidavit of Lester A. Smalls). Plaintiff

contends that certified mail service, as authorized by the regulations and as used to notify defendants of the violations and proposed assessments, satisfies due process. Plaintiff requests summary judgment on the legal issues and a trial of the factual issue whether defendants were served with notice.

Although defendants challenge the constitutionality of both the regulation authorizing service of notice at the mine site, 30 CFR Sec. 722.14(a)(1), and the regulations authorizing service of notice by certified mail, 30 CFR Sec. 722.14(a)(2) and Sec. 723.17(b), the Court believes it necessary to decide the constitutionality of only the regulations authorizing service of notice by certified mail because all

notices of violation, cessation orders, and notices of proposed assessments were sent by certified mail and plaintiff states that it primarily relied on certified mail service.

The United States Supreme Court has held that, prior to an action which will affect an interest in life, liberty or property protected by the Due Process Clause, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). Personal service, while always constitutionally adequate, is not required and if reasonably calculated to reach interested parties, notice is not

insufficient simply because it fails to reach them. Id. at 313-314, 319. The United States Supreme Court, on three occasions, has stated that notice by mail is sufficient to satisfy due process. Mennonite Board of Missions Adams, ___ U.S. ___, 103 S.Ct. 2706 (1983); Greene v. Lindsey, 456 444 (1982); Mullane, 339 U.S. 306, supra.

It is clear that an action to collect civil penalties assessed for violations of the Act affects an interest in property protected by the Due Process Clause. Thus, prior to an action for collection, notice of the violations and penalties is required in order to allow the persons assessed an opportunity to contest administratively and judicially the fact of violation and the amount of the penalty. The question

is whether notification by certified mail, as provided in 30 CRF Sec. 722.14(a)(2) and 723.17(b), is constitutionally adequate. It is the opinion of the Court that such notice is constitutionally adequate.

Postal service regulations provide that "[c]ertified mail... will be delivered to the addressee or his authorized representative." Domestic Mail Manual, Chapter 9. Subchapter 910, Part 912, Sec. 912.51 (Issue 13, December 29, 1983), incorporated by reference in 39 CFR Sec. 111.1-111.5 (1983) (hereinafter DMM). If for any reason, the carrier cannot deliver the certified article, he leaves a notice of arrival at the address and the article is held at the post office for the addressee DMM Sec. 912.55. If the

article is not called for within 5 days, a second notice is issued. Id. If the article is not called for or redelivery requested, the article is returned to the sender. Assuming the address is correct and the addressee is not attempting to evade service, it is reasonable to assume that under most circumstances the mail will reach the addressee. Thus, service of notice of the violations and penalties by certified mail is reasonably calculated under the circumstances to provide interested parties with notice, as required by due process. The provisions of the regulations which state that service of notice is not made incomplete by refusal to accept delivery or to collect mail does not render the regulations unconstitutional. It is

reasonable to assume that if persons refuse to accept delivery or collect theirmail, the mail has in fact reached them. See Hoffman v. National Equipment Rental, Ltd.. 643 F.2d 987, 990 (4th Cir. 1981). For the foregoing reasons the Court finds the regulations constitutional and grants summary judgment on the issue of law for plaintiff. However, because defendants say they never received notice of the violations and penalties, the Court believes this factual issue must be tried. If in fact defendants would be entitled to contest the fact of violation and the amount of penalty at an administrative hearing, as provided by 30 U.S.C. Sec. 1268(c).

Defendants also argue that plaintiff is barred by the doctrine of

laches and is estopped from bringing the action because plaintiff failed to timely notify defendants of the civil penalties, delayed in bringing the action, and failed to follow the requirements of the Act. Plaintiff says the United States cannot be estopped by misconduct of its agents and that defendants have shown no reliance on their part to justify estoppel.

The Act provides that, upon issuance of a notice or order chargig a violation of the Act, the Secretary shall within 30 days inform the violator of the amount of the proposed penalty. 30 U.S.C. Sec. 1268(c). This requirement was met for notice of violations 79-2-12-36 and 80-2-10-16 and cessation order 79:2:12:18. However, notice of the proposed amount of penalty

for cessation orders 80-2-10-4 and 80-2-23-14 was not mailed until approximately two years after notice of the violations. The apparent reason for this delay was that the regulations were being modified to place a limit on the amounts which could be assessed. (See Letter from Carolyn Carter, Assessment Specialist, Office of Surface Mining, to Pryor and Glenn Coal Co., dated May 7, 1982, attachment to plaintiff's motion for summary judgment).

This court has held that the 30-day notice provision of 30 U.S.C. Sec. 1258(c) is not jurisdictional; thus failure of the Secretary to act within 30 days does not render the penalties viod. United States v. Log Mountain Mining Co., 550 F.Supp. 811 (E.D. Tenn. 1984). Neither does the delay estop the

government from bringing the present action. To assert estoppel against the federal government, defendants must prove the ordinary elements of estoppel plus some act of affirmative misconduct. Sigmon Fuel Company v. Tennessee Valley Authority, 531 F.Supp. 80, 82 (E.D. Tenn. 1982), rev'd on other grounds, 709 F.2d 440 (6th Cir. 1983). Defendants have failed to establish the ordinary element of estoppel that they relied to their detriment on the delay in notice. Further they have faialed to allege and prove any affirmative misconduct by the government. Thus, the estoppel argument is without merit.

Equally without merit is defendants' equal protection argument. See Graham v. Office of Surface Mining Reclamation and Enforcement, 722 F.2d

1106, 1113-1114 (3rd Cir. 1983).

For the foregoing reasons it is ordered that the government's motion for summary judgment is granted on the issues of law and defendants' motion for summary judgment is denied. It if further ordered that the issue of fact whether defendants received notice is to be set for trial.

/s/By: Thomas G. Hull
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
v.) CIV.
)
3-84-14
PRYOR BOLTON and GLEN McCULLAH)
d/b/a PRYOR AND GLEN COAL CO.,)

O R D E R

For the reasons stated in a memorndum opinion this day passed to the Clerk for filing, it is ORDERED that defendants' motion for summary judgment is DENIED and the government's motion for summary judgment is GRANTED on the issues of law. It is further ORDERED that the issue of fact whether defendants received notice shall be set for trial.

/s/By: Thomas G. Hull
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
v.) CIV.
)
3-84-14
PRYOR BOLTON and GLEN McCULLAH)
d/b/a PRYOR AND GLEN COAL CO.,)

MEMORANDUM

This is an action to collect civil penalties assessed against defendants Glenn McCullah and Pryor, doing business as Pryor and Glenn Coal Company, pursuant to the Surface Mining Control and Reclamation Act of 1977 [the Act], 30 U.S.C. Sec. 1201, et seq. The Act provides for issuance of cessation orders annd assessment of civil penalties against any person who violates the Act. 30 U.S.C. Sec. 1268(a). The person charged with a violation may contest the charge in

administrative and judicial proceedings by forwarding the proposed amount of the penalty to the Secretary of the Interior. 30 U.S.C. Sec. 1268(c). Failure to forward the money to the Secretary within 30 days from notice of the proposed penalty results in a forefeiture of all legal rights to contest the violation or amount of the penalty. Id.

In this case, civil penalties were assessed against defendants in the amount of $199,000.00. Defendants failed to exhaust administrative remedies. Thus, the government made a motion for summary judgment on the ground that the penalties were finally due and owing. Defendants contested the motion for summary judgment contending that they never received notice of the

violations and proposed penalties. Defendants attacked the constitutionality of the regulation permitting service of notice of the violations and assessments by certified mail. The Court held that the regulation permitting service by certified mail was constitutional but denied plaintiff's motion for summary judgment because of the contested issue whether defendants, in fact, received notice of the violations and penalties (order entered May 24, 1984).

The factual issue came on for trial on August 28, 1984. Pursuant to Rule 52 of the Federal Rules of Civil Procedure the Court makes the following findings of fact:

Defendants Pryor Bolton and Glenn McCullah operated the partnership of

Pryor and Glenn Coal Company. The mailing address of the partnership was Route 1, Duff, Tennessee 37729.

The following documents were mailed by certified mail to the Pryor and Glenn Coal Company, c/o Pryor Bolton, Route 1, Duff, Tennessee, 37729.

1. Notice of violation (NOV) 79-2-12-36, notice of proposed assessment, final order and final demand. All were marked "refused".

2. Cessation order (CO) 79-2-12-18 notice of proposed penalty assessment, final order and final demand. All were returned marked "refused".

3. CO 80-2-10-16, notice of proposed penalty assessment, final order, and final demand. The CO and proposed penalty assessment were returned mrked "out-of-business"; the other documents were returned marked "refused".

4. CO 80-2-10-4, notice of proposed penalty assessment, final order and final demand. All were returned marked "refused".

5. CO 80-2-23-14, notice of

proposed penalty assessment, final order and final demand. The CO was returned marked "out-of-business"; the notices were returned marked "refused".

The following documents were mailed by certified mail to the Pryor and Glenn Coal Company, c/o Glenn McCullah, 515 W. Elm St., LaFollette, Tennessee 37766, and were returned unclaimed: CO 80-2-10-4, CO 80-2-23-14, NOV 80-2-10-16. Additionally, NOV 79-2-12-36 and CO 79-2-12-18 were tendered at the mine site and were refused.

Defendant Bolton followed a practive never to accept certified mail

The Court makes the following conclusions of law:

Defendants cannot complain that they received no notice of the documents when they wilfully evaded service. See

Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987, 990 (4th Cir. 1980).

For the foregoing reasons, it is ORDERED the plaintiff have judgment against the defendants in the amount of $199,800.

/s/By: Thomas G. Hull
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
v.) CIV.
)
3-84-14
PRYOR BOLTON and GLEN McCULLAH)
d/b/a PRYOR AND GLEN COAL CO.,)

O R D E R

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that plaintiff have judgment against defendants for $199,800.00., together with interest at the rate of 11.98 percent per annum from the date of this judgment, and the costs of this action.

ENTER:

/s/By: Thomas G. Hull
United States District Judge

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

Criminal ac .ons--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Sec. 1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at te instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) ...

(b) ...

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days.

(d) ...

(e) ...

(f) ....

30 U.S.C. Sec. 1268. Penalties

(a) ...

(b) Hearing. A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, and order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Notice; waiver. Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the

person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Recovery in civil action. Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) ...

(f) ...

(g) ...

(h) ...

(i) ....

30 U.S.C. Sec. 1271. Enforcement.

(a) Notice; Federal inspection; waiver; cessation order; affirmative obligations; hearing; suspension or revocation of permits; contents of notices and orders; expiration date. (1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the

inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cesstion of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days from the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cesation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Sectetary or his authorized representative pursuant to subparagraph

(a)(5) of this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authoried representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permitte's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued

to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: Provided, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing.

(b) ...

(c) ...

(d) ...

CERTIFICATE

I, David A. Burkhalter, II, a member of the Bar of the Court, pursuant to Supreme Court Rule 19 and Rule 28, hereby certify that I have served Robert S. More, Special Assistant U.S. Attorney, Department of the Interior, P.O. Box 15006, Knoxville, TN 37901, and the Solicitor General, Department of Justice, Washington, D.C. 20530, with three (3) true and exact copies of the foregoing Petition and filed with the Court forty (40) true and exact copies, properly addressed to the Clerk of the Court, by depositing same in the United States Post Office, first class postage prepaid, or with the Knoxville terminal of Federal Express, a corporation offering overnight delivery of documents and other articles, this the 24th day of Feb., 1986.

DAVID A. BURKHALTER, II

STATE OF TENNESSEE
COUNTY OF KNOX

SUBSCRIBED and sworn to before me this the 24th day of February, 1986.

NOTARY PUBLIC
My Commission Expires: 8-21-89

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1431

In the Supreme Court of the United States

OCTOBER TERM, 1985

PRYOR BOLTON AND GLEN MCCULLAH d/b/a PRYOR AND GLEN COAL CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1431

PRYOR BOLTON AND GLEN MCCULLAH d/b/a PRYOR AND GLEN COAL CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States may not collect a civil penalty assessed against them for violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (& Supp. II) 1201 *et seq.*, because they refused to accept various notices regarding the violations that were sent to them by certified mail.

1. Petitioners began coal mining operations in September 1979 at a site in Tennessee without obtaining the required permit. Inspectors visited the site in October 1979 and issued a cessation order and a notice of violation. They tendered copies of those documents to petitioner Bolton at the mine site, but he refused to accept them. Copies of the cessation order and the notice of violation, along with a notice of proposed assessment of civil penalties, were then sent to petitioners' business address by certified mail, but were returned marked "refused." Pet. App. 79-80.

An inspection in 1980 revealed that the mining operation had been abandoned without reclamation. Another cessation order, notice of violation, and notice of proposed assessment of civil penalties were issued and sent to petitioners by certified mail. The documents sent to Bolton were returned marked "refused," the documents sent to McCullah were returned marked "unclaimed," and the documents sent to their business address were returned marked "out of business." A second inspection in 1980 showed that the mine site remained abandoned and unreclaimed. Another cessation order and another notice of proposed assessment of civil penalties were issued. Although again sent to petitioners by certified mail, the documents were again returned. Pet. App. 81-82.

2. After a final penalty assessment order and a demand letter were sent to petitioners by certified mail and returned marked "refused" (Pet. App. 83), the United States brought this action to collect the civil penalties that had been assessed, which amounted to $199,800 (*id.* at 120). Section 518(c) of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1268(c), provides that, after the Secretary informs the mine operator of the proposed amount of the penalty for a violation, "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Section 518(c) also provides that "[f]ailure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."[1] Since petitioners

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[1]The courts of appeals have uniformly upheld the validity of the prepayment requirement of Section 518(c). See, *e.g.*, *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106, 1111 (3d Cir. 1983); *United States* v. *Crews*, 740 F.2d 969 (6th Cir. 1984) (Table), cert. denied, No. 84-749 (Jan. 14, 1985).

had failed to pay the penalties within 30 days after the notices of assessment of penalties were sent to them, as required by Section 518(c), the government contended that they had waived their right to contest these penalties and moved for summary judgment.

Petitioners argued that they were not barred by Section 518(c) from challenging the penalties assessed against them because they had never been served with the notices of violation, cessation orders, and notices of assessment of civil penalties. Petitioners claimed that the applicable regulations regarding service of those documents, 30 C.F.R. 722.14 and 723.17—which provide that the documents may be sent by certified mail and that refusal to accept the documents does not make the service invalid[2]—are unconstitutional.

The district court rejected petitioners' argument. It noted that "due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Pet. App. 105 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Since this Court has three times stated that notice by mail satisfies the requirements of due process—in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 800

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[2]Section 722.14(a)(2), which governs service of notices of violation and cessation orders, provides that "service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept." Section 723.17(b), which governs service of notices of assessment of civil penalties, provides that such notices may be sent by certified mail and provides that if the certified mail is tendered "at any address at which that person is in fact located, and [the operator] refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender."

(1983); *Greene* v. *Lindsey*, 456 U.S. 444, 455 (1982); and *Mullane*, 339 U.S. at 319—the district court concluded that "service of notice of the violations and penalties by certified mail is reasonably calculated under the circumstances to provide interested parties with notice, as required by due process" (Pet. App. 108). The district court also concluded that petitioners "cannot complain that they received no notice of the documents when they wilfully evaded service" (*id.* at 119). The district court granted the government's motion for summary judgment (*id.* at 114).

The court of appeals affirmed (Pet. App. 74-97). With respect to petitioners' argument that the regulations authorizing service by certified mail violate due process, the court found petitioners' "contentions unpersuasive and affirm[ed] the district court's conclusions" (*id.* at 90).

3. Petitioners argue primarily (Pet. 28-53) that the lower courts erred in rejecting their due process challenge to the regulations regarding service. There is no merit to petitioners' contentions. As the lower courts concluded, petitioners were given notice reasonably calculated to apprise them of the penalties assessed against them. This Court stated in *Greene* v. *Lindsey* that "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings" especially where, as here, "the subject matter of the action also happens to be the mailing address of the defendant" (456 U.S. at 455). Petitioners made a calculated decision to ignore notices from the Office of Surface Mining in an attempt to avoid their obligations under the surface mining laws. Their decision to refuse to accept the various notices sent to them by certified mail does not render the agency's regulations governing service of notices violative of due process, either generally or as

applied. In the absence of any conflict in the circuits, petitioners present no question warranting review by this Court.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986

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[3]Petitioners' claims that equitable principles justify a reduction in the amount of the civil penalty (Pet. 53-65) and that the statute and the regulations violate the Equal Protection Clause (*id.* at 65-70) are manifestly without merit.